No. 12,469

IN THE UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK HYNES, Regional Director, FISH AND WILDLIFE SERVICE, Department of the Interior,

Appellant,

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, McNEILL & LIBBY, FRANK McCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., and UGANIK FISHERIES, INC.,

Appellees.

Appeal from the District Court for the Territory of Alaska, Fourth Division

BRIEF FOR THE APPELLEES

EDWARD F. MEDLEY,
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May, 1950

FARWEST LITHOGRAPH & PRINTING COMPANY, SEATTLE

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment of the district court entered on the mandate of the Supreme Court on September 19, 1949, enjoining appellant and those acting in concert with him from enforcing a certain regulation of the Secretary of the Interior with respect to fishing in Alaskan coastal waters. (R. 78-80.) Notice of appeal was filed on November 17, 1949. (R. 82.) Appellees invoked the jurisdiction of the district court under the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U. S. C. § 101, 41 Stat. 1203. The jurisdiction of this Court rests on 28 U. S. C. § 1294 (2).

QUESTION PRESENTED

Whether the district court complied with the Supreme Court's mandate in determinating:

(1) that "timely steps" were not "taken in this pro-

ceeding," within the intendment of the Supreme Court's opinion and mandate; and

(2) that the decree entered enjoined the appellant and all acting in concert with him "substantially as ordered" by the earlier permanent injunction issued in this case and thus was in accordance with the Supreme Court's opinion and mandate.

STATEMENT

Appellees began this action June 25, 1946, asking an injunction against the enforcement of Alaska Fisheries Regulation 208.23 (r), Title 50 C. F. R., 11 Fed. Reg. 3105, issued March 22, 1946, in which the Secretary of the Interior set apart as a reserved fishing area certain waters extending 3,000 feet from the shore line, which were a part of the Karluk Indian Reservation, Kodiak Island, Alaska. This regulation, purportedly issued under the White Act of June 6, 1924, 43 Stat. 464, as amended, June 18, 1926, 44 Stat. 752, 48 U. S. C. §§ 221-228, closed these waters to all fishing except "by natives in possession of said reservation," or "by other persons under authority granted by said natives." Frank Hynes, Regional Director, Fish and Wildlife Service, Department of Interior, appellant herein, was named as defendant. The action also sought to have declared invalid Public Land Order No. 128, 8 Fed. Reg. 8557, issued May 22, 1943, in which the Secretary of the Interior included in the Karluk Indian Reservation the coastal waters just described. (Orig. Rec. 2-18.)

A preliminary injunction against the enforcement of Regulation 208.23 (r) was issued. (Orig. Rec. 37.) After trial, the district court held that regulation invalid and is-

sued a permanent injunction against its enforcement. (Orig. Rec. 40.) The court also held the Land Order invalid. (Orig. Rec. 42.) *Grimes Packing Co. v. Hynes,* 67 F. Supp. 43.

On appeal by the defendant, appellant herein, this Court affirmed the district court on November 21, 1947. *Hynes v. Grimes Packing Co.,* 165 F. 2d 323.

On certiorari the Supreme Court sustained this Court in an opinion holding invalid Alaska Fisheries Regulation 208.23 (r), while upholding the inclusion of the coastal waters in the Karluk Indian Reservation by Public Land Order No. 128. (R. 40, 49-50.) Part IV of the Court's opinion, dealing with the question of relief, recognized that the holding "that the White Act cannot be used to create a monopoly in the Indians" and "that coastal waters may be included in the reservation waters" established "a different basis for administrative and judicial conclusions" concerning "the administration of the Karluk Reservation and the protection of the fishing preserves." The 1945 ordinance of the Native Village of Karluk, said the Court, "must be considered." Describing this ordinance, the Court pointed out that the ordinance, which antedated the invalid regulation, was evidently based on the theory that the creation of the reservation gave exclusive fishing rights to the natives in possession; that, because of a provision in the corporate charter of the Native Village of Karluk, fishing permits authorized by the ordinance had to be approved by the Secretary of the Interior or his authorized representative; that nothing in the record indicated "the reasons for the $2 fee for residents or the $40 fee for nonresidents or their relation to the cost of policing the area"; and that, apparently, the Department's only direct control over an ordinance it had once approved was "by approval or disapproval of

amendments." (R. 50-53.) The Court continued with the following directions as to relief:

> "This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Department of the Interior to administer its responsibilties fairly to fishermen and Indians are involved. These are questions of public policy which equity is alert to protect. This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitively of the controversy. With our conclusion on the law as to the establishment of the reservation and the invalidity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.
>
> "We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered November 6, 1946. If

timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents." (R. 53-55.)

The mandate of the Supreme Court issued to the district court on July 1, 1949. On June 13, 1949, the Secretary of the Interior had ordered Regulation 208.23 (r), which had been redesignated 108.24 (r) (13 Fed. Reg. 8695), and which the Supreme Court, as well as this Court and the district court, had held void, to be deleted from the Alaska Fisheries Regulations. (R. 73-74.) Solely on the ground that this void regulation had been deleted, the appellant, on July 20, 1949, moved the district court for an order dissolving the temporary and permanent injunctions and dismissing the action. (R. 70-71.)

Neither appellant nor the Secretary of the Interior took any other "steps . . . in this proceeding" during the thirty days following the issuance of the Supreme Court's mandate.[1] On September 19, 1949, after the expiration of the thirty days, the appellees filed in the district court a motion for judgment on the mandate, asking that court to enter

[1] On July 25, 1949, we are informed by appellant's brief in this Court, the Council of the Native Village of Karluk amended its ordinance by lowering the fishing permit fee for nonresidents from $40 to $5 and eliminating the provision for a $500 fine for fishing without a license, though the prohibition against unlicensed fishing remained. The ordinance was otherwise virtually identical with its predecessor. The Secretary of the Interior approved this amended ordinance on September 8, 1949, some forty days after the expiration of the thirty days provided for in the Supreme Court's mandate. This action with respect to the ordinance does not appear in the record and was apparently not called to the attention of the district court.

"a decree enjoining the defendant Hynes and all acting in concert with him in accordance with the terms of the permanent injunction entered on November 6, 1946," as directed by the opinion and mandate of the Supreme Court. (R. 75-76.)

The district court, on the same day, denied the appellant's motion for dismissal, granted appellees' motion for a permanent injunction (R. 76-77), and entered judgment on the mandate, ruling that "no steps were taken in this proceeding in accordance with the decision of the Supreme Court and the mandate entered thereon." (R. 79.) The court issued a permanent injunction enjoining the appellant and persons acting in concert with him from enforcing "Section 208.23 (r) of the 1946 Alaska Fisheries General Regulations or any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise." (R. 79-80.)

Appellant then applied to the Supreme Court for a writ of mandamus directing the district court to vacate the judgment on the mandate, dissolve the temporary injunction, and dismiss the action. The Supreme Court denied this application on January 9, 1950, citing *Ex parte Fahey*, 332 U. S. 258 (1947), which held that the remedy of mandamus is not available as a substitute for an appeal. *Hynes v. Pratt*, 338 U. S. 908.

Appellant then perfected this appeal, which had been noted on November 17, 1949. (R. 82, 84.)

ARGUMENT

Timely "steps . . . in this proceeding" Were Not Taken by the Appellant or the Secretary of the Interior, Within the Intendment of the Supreme Court's Mandate.

The only action taken by the Secretary of the Interior or the appellant within thirty days from the issuance of the Supreme Court's mandate was the deletion of Regulations 208.23 (r), and the motion to dismiss based on that deletion. (R. 70-71.) That action did not constitute "steps . . . taken in this proceeding" within the meaning of the Supreme Court's opinion.

To revoke the void regulation was to do nothing. The Supreme Court, having already declared Regulation 208.23 (r) invalid and unenforceable, could hardly have meant that the thirty days allowed "for the Secretary of the Interior to give consideration to the effect of our decision," was to be used by the Secretary in deciding whether to revoke that invalid regulation.

It is, of course, not for the district court or the appellees to say what action the Secretary ought to have taken. If the Secretary did not understand the mandate, he could have asked, through appellant, for its clarification. The decision as to what action should be taken was an administrative determination which only the Secretary could make, as the Supreme Court indicated in its opinion. (R. 50, 53-54.)

Even when the Secretary, presumably after due consideration, had determined that nothing should be done, he

could have at least made timely disclosure of his determination to the district court and indicated, if that was his decision, that he would not disturb the status quo. (*Cf.* Appellant's Brief, p. 9.) Instead, he chose to stand upon the purely formal act of revocation of the void regulation, without committing himself as to the future.

Appellant seems to suggest that the amendment of the Karluk Village ordinance by lowering the license fee for nonresidents and eliminating the $500 penalty for violation constituted a step of the kind contemplated by the Supreme Court. (Appellant's Brief, p. 8.) Even assuming that these two alterations in the ordinance that troubled the Supreme Court in so many respects would have had any legal significance, the appellant nevertheless could not rely upon them because he did not call them to the attention of the district court, so far as appears from the record. *Hebets v. Scott,* 152 F. 2d 739, 741 (9th Cir. 1945); *Apex Smelting Co. v. Burns,* 175 F. 2d 978, 982 (7th Cir. 1949) (collecting cases); see *Hormel v. Helvering,* 312 U. S. 552, 556 (1941). But an even more fundamental objection to reliance upon this amendment is that although, as the Supreme Court noted, it had to be approved by the Secretary or his authorized representative (Supreme Court's opinion, R. 51, 53), it did not receive that approval until after the thirty days following the issuance of the mandate. Thus in no sense can it be argued that "timely steps" were taken in connection with the ordinance "in this proceeding."

In issuing a permanent injunction upon the failure of the Secretary and the appellant to take any timely steps in this proceeding, the district court was not "forcing the hand of the Secretary," as the appellant suggests. (Appel-

lant's Brief, p. 9.)[2] Rather that court was following the explicit command of the Supreme Court, which had directed that:

> "Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered November 6, 1946." (R. 55.)

II.

The Decree Entered by the District Court Enjoins Appellant and Those Acting in Concert with Him "substantially as ordered in the permanent injunction entered November 6, 1946," and so Complies With the Mandate of the Supreme Court.

Since "timely steps" were not taken by the Secretary, the district court had no choice except to enter an injunction against appellant. It is suggested that the injunction entered was not consistent with the mandate. That injunction is substantially identical with the injunction of November 6, 1946, except that, in addition to enjoining the enforcement of Regulation 208.23 (r), it also enjoins the enforcement of "any other regulations of like or substantially

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[2] Decatur v. Paulding, 14 Pet. 497 (1840), from which appellant quotes (Appellant's Brief, p. 9), plainly has no applicability here: It held that mandamus does not lie to review a determination by an administrative officer on a question committed to his administrative judgment and discretion. The Court described, as "the ordinary duties of the executive departments of the government," the determination of questions committed to administrative discretion, not questions like the one involved in the case at bar, in which the Supreme Court reviewed the administrative determination and held it invalid.

like import which may hereafter be promulgated or attempted to be promulgated by the Department of Interior of the United States of America through its Fish and Wildlife Service or otherwise."

There is, of course, no doubt that the district court would ordinarily have power to include such a provision in its decree. As the Supreme Court has said, "A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed . . . . " *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, 435 (1941). See also *National Labor Relations Board v. Swift & Co.*, 108 F. 2d 988, 990 (7th Cir. 1940).[3] The only question then is whether the injunction challenged herein is substantially similar to the injunction of November 6, 1949.

To be in any degree effective, especially in the light of the Secretary's reliance on mere formal revocation of the invalid regulation, the decree had to enjoin the enforcement not only of the existing invalid regulation, but also of any

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[3] Addison v. Holly Hill Co., 322 U.S. 607, 620 (1944), quoted by appellant (Appellant's Brief, p. 10), is obviously inapposite: It did not involve a suit for an injunction against an administrative officer; it was a suit by employees against their employer for wage payments under the Fair Labor Standards Act in which the Court, after holding invalid the part of the administrative regulations upon which the action depended, a definition of "the area of production" for purposes of exemption from the Act, remanded to the district court with directions to hold the case until the Wage and Hour Administrator made a redetermination, within his authority, as to the area of exemption. The language quoted is the Court's answer to a suggestion that the Administrator, limited by the Court's decision to defining the area of exception geographically and not by reference to the number of employees employed by an employer, might "resort to gerrymandering or to any other device to accomplish by indirection what the decision holds he cannot do directly." See separate opinion of Mr. Justice Roberts, 322 U.S. 623, 624.

substantially similar future regulations. Obviously, the Supreme Court did not intend that the district court enter a bootless decree, one that would leave the Secretary and the appellant free to promulgate and enforce an unlawful regulation substantially like the one declared invalid. *Cf. McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 192-193 (1949). The prospective aspect of the decree has no effect on appellant other than to preclude him from enforcing a regulation substantially like Regulation 208.23 (r) and thus evading the rulings of this Court, the district court and the Supreme Court. He can hardly contend that the Supreme Court intended to permit him to evade those rulings. He should not be heard to contend that he is injured by a provision insuring against such evasion.

The words "or otherwise" stand on the same footing. They merely proscribe the appellant from enforcing regulations substantially like the one held invalid which are promulgated by the Department of the Interior through agencies other than the Fish and Wildlife Service.[4] The only effect of this language is to prevent the appellant, by any means, from evading the decree by a device which he would hardly contend that he intended to employ.

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[4] It would seem that the Supreme Court anticipated this problem and had in mind that the District Court would so frame its decree. The Supreme Court did not direct that the decree simply restate the original injunction, but rather directed that it enter a decree "substantially as ordered in the permanent injunction entered November 6, 1946."

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court is in accordance with the opinion and mandate of the Supreme Court and should therefore be affirmed.

Respectfully submitted,

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